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No. 85-2039

Supreme Court, U.S.
FILED
SEP 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF HORTON JOHNSON, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In our petition, we demonstrated that the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), bars actions brought under the Federal Tort Claims Act (FTCA) on behalf of service members injured incident to military service by the alleged negligence of civilian employees of the United States, and that the court of appeals' contrary conclusion is flatly inconsistent with the decisions of all of the other courts of appeals that have considered the issue. Respondent concedes (Br. in Opp. 1) that there is a conflict in the circuits on the issue. Notwithstanding this acknowledged conflict, respondent asserts that review by this Court is unwarranted because the conflict has been effectively resolved by this Court's decision in *United States* v. *Shearer*, No. 84-194 (June 27, 1985). Respondent's contention is based on a misreading of *Shearer*.

In *Shearer*, a soldier, while away from his base and off-duty, was murdered by a fellow soldier. The survivor of the soldier sought damages under the FTCA claiming that Army officials were negligent in failing to prevent the murder. Slip op. 1-2. The Court unanimously held that the action was barred by the *Feres* doctrine.

Respondent's repeated assertions (Br. in Opp. 2, 5) that *Shearer* somehow resolved the issue presented in this case in her favor is entirely without merit. The Court in *Shearer* was faced with a claim of negligence by Army officials and thus had no occasion to address whether the *Feres* doctrine may be evaded by alleging civilian negligence. Moreover, respondent's claim (Br. in Opp. 5) that the Court in *Shearer* implicitly rejected the arguments pressed by the government in this case overlooks the fact that the Court in *Shearer* reaffirmed the holding in *Feres* "that a soldier may not recover under the Federal Tort Claims Act for injuries which 'arise out of or are in the course of activity incident to service.' " *Shearer*, slip op. 4-5, quoting *Feres*, 340 U.S. at 146. The ruling in *Shearer* thus in no way calls into question the decisions of five circuits (Pet. 6-7) that service members injured incident to military service on account of the negligence of civilian government employees may not pursue FTCA actions.[1]

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[1]The Eleventh Circuit recently extended its decision in this case in *Stanley* v. *United States*, 786 F.2d 1490 (1986), where the court, citing its decision here, held that the *Feres* doctrine did not bar a serviceman from bringing an FTCA claim based on negligence on the part of his superior officers. The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Stanley* (we will furnish a copy of our petition to counsel for respondent). The Eleventh Circuit's extension of its erroneous decision in this case provides another reason why the Court should grant review here.

Respondent notes (Br. in Opp. 4-5) that the Court in *Shearer* emphasized that the *Feres* doctrine is best explained by the fact that allowing FTCA actions seeking recovery for injuries incurred incident to military service to go forward "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Shearer*, slip op. 7. In this respect, the Court in *Shearer* broke no new ground, reaffirming what the Court had made clear more than twenty years before—that "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligents acts committed in the course of military duty.' " *United States* v. *Muniz*, 374 U.S. 150, 162 (1963), quoting *United States* v. *Brown*, 348 U.S. 110, 112 (1954). See also *Chappell* v. *Wallace*, 462 U.S. 296, 299-300 (1983). All but one of the nine cases cited in our petition (at 6-7) as conflicting with the court of appeals' decision here were decided after the Court in *Muniz* stated that the *Feres* doctrine is best explained by factors relating to military discipline and effectiveness. It is therefore manifest that the Court's reaffirmation of that statement in *Shearer* in no way casts doubt on the rulings of those courts that have held that the *Feres* doctrine applies in cases alleging negligence on the part of civilian government employees working with the military.

Respondent also asserts (Br. in Opp. 5) that the Court in *Shearer*, in eschewing "bright-line rules" (*Shearer*, slip op. 5), implicitly rejected our claim that Lieutenant Johnson's status as an active-duty serviceman injured incident to service bars an FTCA action. Respondent's discussion of this aspect of the *Shearer* opinion is misleading. In rejecting the use of bright-line rules, the Court was agreeing with the government that the military command structure would be

damaged by permitting the suit to go forward even though the soldier was off-duty and not on a military base when he was murdered, factors that have often led courts to conclude that an injury was not incurred incident to military service. Cf. *Brooks* v. *United States*, 337 U.S. 49, 50 (1949). The Court's conclusion that military discipline and effectiveness can be undermined by FTCA suits even when soldiers are injured while off-duty and off-base does not suggest that a service member injured while on a military mission may go forward with an FTCA claim.

Finally, respondent cannot avoid the application of the *Feres* doctrine by asking the Court to ignore the obvious military nature of Lieutenant Commander Johnson's accident and by characterizing the claim as one involving "routine air traffic control service" (Br. in Opp. 7) that is "no different in any respect than it would have been if [respondent's] decedent had been employed by United Airlines" (*id.* at 9). It is undisputed that Lieutenant Commander Johnson died in the course of performing a rescue operation as a member of the United States Coast Guard, and that air traffic controllers employed by the Federal Aviation Administration were participating in this rescue operation by providing radar assistance. See Pet. App. 12a. The facts underlying respondent's FTCA action thus bear little resemblance to a commercial flight by United Airlines. United Airlines is not "a military service and branch of the armed forces of the United States" (14 U.S.C. 1), and pilots employed by United Airlines are not responsible for operating "rescue facilities for promotion of safety on, under, and over the high seas * * * of the United States." 14 U.S.C. 2. Plainly, the rescue operation underlying respondent's FTCA action

(with its attendant dangers) is "without counterpart in civilian [aviation]." *Chappell*, 462 U.S. at 300, quoting *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975).[2]

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

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[2]Respondent's attempt to have the Court overlook the military context of her FTCA claim is inconsistent with the decision in *Shearer*. In *Shearer* the plaintiff argued that her FTCA action did not involve military affairs but rather "a 'straightforward personnel decision' " (*Shearer*, slip op. 6, quoting Tr. of Oral Arg. 37). The Court squarely rejected this attempt to overlook the military context of the case. See *ibid.* The Court in *Feres* rejected a similar suggestion. There, in cases involving claims of negligence by military physicians, the Court recognized that medical care during military service was in no way comparable to "the usual civilian doctor and patient relationship * * *." *Feres*, 340 U.S. at 142.